No. 75-1402

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

STEVE KARATHANOS AND JOHN KARATHANOS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1402

UNITED STATES OF AMERICA, PETITIONER

v.

STEVE KARATHANOS AND JOHN KARATHANOS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

---

1. Respondents contend (Br. in Opp. 6-8) that this case is an inappropriate vehicle for review of the question presented because the claim of inapplicability of the exclusionary rule when the government has procured a warrant in good faith was not presented to the district court. At a hearing before the district court on July 15, 1975, however, the Assistant United States Attorney stated in opposition to respondent's motion to suppress (Tr. 52-53):[1]

> [S]uppression has to do with the wrongdoing on the part of police officers. And the suppression—that defects attributable to an affidavit and a warrant and to other defects, which do not go to wrongdoing by police officers and authorities executing

[1] The page of the transcript on which this excerpt appears was cited incorrectly at Pet. 5, n. 1. We are lodging the transcript of the hearing before the district court with the Clerk of this Court.

the warrant should not be held against the Government. It would serve no deterrent effect.

The exclusionary rule issue also was fully briefed by the parties in the court of appeals and constituted a significant part of that court's opinion (see Pet. App. 13a-18a). Indeed, the government's contention that the remedy of suppression should not be applied in this case was the subject of a concurring opinion by Judge Oakes (Pet. App. 29a-30a) and was the alternative ground on which Judge Van Graafeiland, dissenting below, would have reversed the order of the district court (Pet. App. 26a-29a). Thus, there is no procedural impediment to review by this Court.

Nor is there merit to respondents' related contention (Br. in Opp. 8-9) that the petition should be denied because they may have been prejudiced by the government's failure to request an evidentiary hearing in the district court on the issue of good faith. As respondents have conceded in this Court (Br. in Opp. 7) and in the court of appeals (Br. 30, n. 19), it is most unlikely that the district court would have acceded to that request after having determined that the search warrant was issued without probable cause. But, in any event, the question whether respondents may have been prejudiced by the delay or whether the prejudice, if any, is properly attributable to the government are matters that would be open on remand if this Court were to reverse the judgment of the court of appeals.

2. Respondents' argument on the merits (Br. in Opp. 9-13) stresses the continued necessity for an unyielding application of the exclusionary rule whenever law enforcement officers have acted without probable cause. The petition sets forth our contrary position that, in view of the substantial societal costs from the suppression of relevant and probative evidence of crime, a more discriminating imposition of this judicially-created remedy is required. While we see no reason to repeat these views, several points presented by respondents deserve rebuttal.

a. The linchpin of respondents' contentions is that, under the government's proposal, the issue of probable cause would be shielded from judicial scrutiny unless the defendant could demonstrate that the warrant was procured through bad faith or material misrepresentations. On the contrary, we have explicitly stated (Pet. 11) that suppression remains a proper sanction, regardless of the the subjective good faith of the law enforcement officers or the issuing magistrate, when the showing of probable cause was so minimal "as to render official belief in its existence entirely unreasonable." *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (Powell, J., concurring). The district court, therefore, would still be required to determine whether probable cause existed for the issuance of the warrant; only if it answered that question in the negative would the court be obliged to consider the additional factors outlined in our petition in determining whether to apply the drastic remedy of suppression. Hence, there is no reason to believe that police would seek or could obtain warrants absent substantial evidence of crime, that defendants would be deterred from bringing motions to suppress, or that the courts would be ignorant of the identities of those magistrates acting as a "rubber stamp."

b. We noted in our petition (p. 13) that alternatives to evidentiary suppression exist to control the conduct of federal magistrates. It is no answer to this contention to point out that other judicial officers, not subject to the district court's supervision, also are empowered to issue warrants. This case involves a warrant issued by a

United States Magistrate, whose powers and tenure are subject to direct control by the federal courts. But more importantly, we see no reason why the exclusionary rule, which has traditionally been limited to "those areas where its remedial objectives are thought most efficaciously served," *United States* v. *Calandra*, 414 U.S. 338, 348, must be applied to disparate situations in the same fashion, or why the rule's utility should not depend upon circumstances such as whether a state or federal court has issued the warrant. Perhaps the Court would conclude that warrants improperly issued by state judges demand a different sanction because of the absence of the more direct remedy available against federal magistrates; but that is a problem for another case.

c. Respondents correctly note that law enforcement officers already have incentives to seek judicial authorization before undertaking a search; they draw from this the conclusion that there is no need to offer additional incentives toward that end (Br. in Opp. 11-12). It appears, however, that a warrant was unnecessary here. See Pet. 10, n. 6. Moreover, warrants are not required in other contexts in which significant invasions of a citizen's liberty and privacy may occur. See *United States* v. *Watson*, No. 74-538, decided January 26, 1976.

3. In sum, although respondents contend that the benefits to be gained from the approach to the exclusionary rule presented in our petition would be slight, they fail to suggest any corresponding benefits to the criminal justice system from the suppression of relevant, probative evidence in cases such as this one. Whichever may ultimately be the better view, the case presents important and recurring questions that should be resolved by this Court.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1976.